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Supreme Court, U.S.
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In The

# Supreme Court of the United States

CRAIG LYNN RANG,

*Petitioner,*

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

ROGER D. PHIPPS
*Counsel of Record*
EVANTHEA P. PHIPPS
PHIPPS & PHIPPS
210 Baronne Street,
Suite 1410
New Orleans, Louisiana 70112
(504) 899-0763

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

38 pp

## QUESTION PRESENTED

1. Whether the United States Fifth Circuit Court of Appeals will be permitted to continue using a pretext-plus analysis in employment discrimination cases despite this Court's having expressly overruled and repudiated such an analysis in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

## PARTIES

The Petitioner is Craig Lynn Rang, an individual.

The Respondent is Schlumberger Technology Corporation, a wholly owned subsidiary of Schlumberger, Limited, a publicly traded corporation listed on the NYSE by the symbol, "SLB" and also listed on the Paris, London, Amsterdam and Swiss Stock Exchanges.

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## PRIOR OPINIONS

The Fifth Circuit opinion sought to be reviewed is unpublished. (App. p. A-1). The District Court issued no opinion.

## JURISDICTION

Petitioner seeks this Court's review of the judgment entered on October 21, 2002, by the United States Circuit Court of Appeals for the Fifth Circuit, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. Section 1254(1). This Petition was mailed within ninety days of November 21, 2002, the date a motion for rehearing was denied in the court below. Rules 13.3 and 29.2.

Jurisdictional basis for the Fifth Circuit is 28 U.S.C. Section 1291, and for the District Court is 28 U.S.C. Sections 1331 and 1337.

## STATUTE INVOLVED

The Age Discrimination In Employment Act, 29 U.S.C. Section 623(a)(1).

## STATEMENT OF THE CASE

## PROCEDURAL HISTORY

Rang filed suit alleging age discrimination under the Age Discrimination In Employment Act, 29 U.S.C. Section 623(a)(1), and various state law claims in the United

States Court for the Northern District of California which granted Schlumberger's motion for transfer. The District Court for the Southern District of Texas directed there would be no "formal discovery" allowed, ordered Rang to provide a "Bill of Particulars", and thereafter Schlumberger took his deposition. The District Court directed Schlumberger to produce some information on five comparators identified by Rang as younger employees who received more favorable treatment at the time Schlumberger terminated Rang's employment.

The District Court granted Rang permission to depose three individuals, ordered production of certain documents by Schlumberger, and instructed Rang to respond in writing after review why they were inadequate or other information was necessary. Rang outlined why the materials produced by Schlumberger were inadequate, setting forth the materials he required if he were allowed discovery. Specifically, Rang sought production of the personnel files, or at least, the performance appraisals, of each of the 12 other employees who composed the forced-ranked group at issue in the RIF.

Schlumberger moved to file a dispositive motion which Rang opposed and sought discovery. The District Court granted Schlumberger's motion to file a dispositive motion and denied Rang's motion to conduct discovery – without Schlumberger opposing the motion.

Schlumberger filed a motion for summary judgment. Rang filed his opposition memorandum along with documents in support. Schlumberger filed objections and reply. Rang filed a response memorandum.

At the November 5, 2001 summary judgment hearing, the District Court granted Schlumberger's motion for

summary judgment "on the merits that Rang recover nothing from Schlumberger", and each of Rang's claims was dismissed. The District Court did not issue reasons and signed a final judgment that date. Rang filed a timely Notice of Appeal.

Rang provided to the District Court and the Fifth Circuit uncontroverted evidence that Schlumberger's policies and procedures were not followed in the RIF process. Rang was the oldest of the comparable employees against whom he was ranked. Rang was the only employee in the division whose office closed and Schlumberger did not transfer and continue to employ. Rang provided uncontroverted evidence that based on Schlumberger's own objective criteria – job grade/classification, and job descriptions – he held a higher job grade/classification, and was objectively more qualified than many of the younger employees retained in similar positions at the time of the RIF.

The Fifth Circuit affirmed that Rang failed to establish a *prima facie* case of age discrimination. The Fifth Circuit also found that "even if plaintiff could satisfy the ADEA's *prima facie* elements", Rang failed to establish pretext, citing *Vadie v. Mississippi State University,* 218 F.3d 365, 374 (5th Cir. 2000). Also, the Fifth Circuit affirmed the District Court's decision's concerning discovery, rejecting Rang's argument that by denying production of the personnel files, or at least the performance appraisals, of all of the employees in the forced ranked group, the District Court abused its discretion during discovery. November 21, 2002, the Fifth Circuit denied Rang's motion for a rehearing.

## STATEMENT OF FACTS

Rang, a degreed Electrical Engineer, thrived for twenty-five years at Schlumberger – from 1974 to 1999 – in a competitive performance-based employment system. Schlumberger awarded Rang many merit increases for his job performance, including merit raises awarded in 1997 and 1998. Also in 1997 and 1998, Schlumberger recognized Rang's job performance with special "Wildcatter Awards".

Schlumberger's "Wireline And Testing Division", which employed Rang, provides "downhole services" to the oil and gas industry. Rang quickly passed through the field ranks – Field Engineer ("FE"), Senior Field Engineer ("SFE"), and General field Engineer ("GFE"). By 1978 Schlumberger promoted Rang "out of the field" to become a Sales Engineer in the Rocky Mountains.

Rang provided the following uncontroverted facts. During the next seven years, Schlumberger assigned Rang at various times to serve as a Sales Engineer, Senior Sales Engineer, and as the District Manager of three different district offices. In 1985, Schlumberger transferred Rang within its "Wireline and Testing Division" from its Rocky Mountain Division to its West Coast Division, specifically, Bakersfield, California, as a Senior Sales Engineer. The Rocky Mountain Division ("Sub-Geomarket"), the West Coast Division ("Sub-Geomarket"), and the Alaska Division ("Sub-Geomarket") all form part of Schlumberger's U.S. Land – West and Alaska Division or "Geomarket".

Rang excelled while working in the West Coast Division. By January 1991, Schlumberger appraised his job performance an "A", noting that it was "excellent", "outstanding", and his sales revenue was "probably the best in all of NAM [Schlumberger's North American Operation]".

While in Bakersfield, Rang displayed outstanding "creativity and initiative" with Schlumberger's clients. Rang landed the first "exclusive" contract with an oil major, a practice which then was copied throughout Schlumberger's NAM operation. Due to Rang's efforts in analyzing the shallow well market in California and involvement in designing a competitive service, that market became Schlumberger's largest perforating district in North America.

In July 1991, Schlumberger assigned Rang to its Billings, Montana sales office and promoted Rang to its highest sales engineer position, Sales Development Engineer, Grade 14.

Schlumberger's Billings office consisted of one sales engineer, Rang, servicing an area known as the "Williston Basin". Rang's territory encompassed: Montana, North Dakota, and the northern halves of South Dakota and Utah. The "Williston Basin" and the Billings area have always been a difficult market for Schlumberger. The clients consist primarily of small independent oil companies rather than the major oil companies. During the next seven years (1992-1998), Schlumberger evaluated Rang's job performance as "normal", "C", "satisfactory". Schlumberger's grading system is designed to fit a bell shaped curve for all employees. A recently retired senior level manager testified a "C" means normal and satisfactory performance.

During the years Schlumberger assigned Rang to its Billings office, it awarded him "merit raises" which commended his job performance. Schlumberger's U.S. Land – West and Alaska Division or "Geomarket" Manager stated

Schlumberger awards "merit raises" only to those employees whose job performance is rated "satisfactory" or better. As recently as 1997 and 1998, Schlumberger through its Rocky Mountain Division Manager, Kellermann, awarded Rang "merit raises". During 1997, Schlumberger also awarded Rang "Wildcatter Awards", which his manager noted was "excellent". A "Wildcatter" is given in special recognition of interpretation skills and innovative introduction and uses of Schlumberger's technology for a given client's needs.

Schlumberger's Rocky Mountain Sales Manager reports to the Rocky Mountain Division Manager. Schlumberger had three different Rocky Mountain Sales Managers during the years Rang worked in the Billings sales office. Two of the three managers, Wayne Richards (1991-95), and Cordes (1995-98), recommended Rang for "merit raises" and rated his job performance a "C". Subsequent to the 1998 "merit raise", Schlumberger assigned Peters, age 39, as its Rocky Mountain Sales Manager.

Schlumberger follows a "management by objectives" philosophy. A senior level retired manager testified yearly objectives are set for an employee which are, "Mutually agreeable, measurable, attainable, and challenging". "[R]arely is anyone expected to meet all the objectives". September 21, 1998, Peters e-mailed Rang his performance objectives for the year 1998. Ten months of the year had elapsed before Schlumberger provided Rang with his objectives.

Generally, Schlumberger provides specific objectives a year in advance of the next job performance appraisal. A recently retired senior level manager testified that Rang's

"objectives were inappropriately delivered both as to method and date".

January 12, 1999, Peters rated Rang's job performance as "D", "improvement needed". Subsequently, in January-February, Peters force-ranked 13 employees he termed the Rocky Mountain "Wireline salespeople team". Peters testified that he based the forced ranking solely on the January 1999 "Performance Appraisal and Development Plan[s]". Peters did not consider any evaluations performed in previous years by previous managers. Based on Peters' forced ranking, Schlumberger selected Rang for "RIF" and terminated his employment effective September 1, 1999.

Schlumberger policies and procedures were not followed in conducting the forced-ranking. Peters included four noncomparable employees in the forced-ranked group. Of the eight comparable employees, Rang, age 49, was the oldest.

Most of the sales engineers worked at offices scattered throughout the Rocky Mountain Division (Sub-Geomarket). In addition to closing the Billings office where Rang worked, two other offices closed where sales engineers included in Peters' forced-ranking worked. Schlumberger closed the offices where Sieben and Richards worked. Schlumberger transferred these engineers, Sieben, age 36, and Richards, age 39, to other locations when the offices where they had worked closed.

Schlumberger promoted Emick to fill the open position of Sales Engineer. This was a job grade increase from 8 to 12 with a corresponding 40% increase in salary. After the RIF, he called on clients previously serviced by Rang. The appraisal used to rank Emick was for some year other

than the 1998 job performance at issue in the RIF. Schlumberger promoted Folkedahl, to fill the open position of Sales Engineer. This was a job grade increase from 7 to 12 with a corresponding 55% increase in salary. Schlumberger permitted Folkedahl to appraise his own job performance. He rated his performance a "B".

Schlumberger informed Rang April 6, 1999 that his employment would be terminated immediately. As a condition of his employment, Schlumberger had required Rang to sign an "Employment Agreement" and a "Patent and Confidentiality Agreement" which provided for six months notice prior to termination or six months pay in lieu of notice. Schlumberger's "Management Manual" provides that usually the employee will be given notice and permitted to work out the notice period. Rang attempted to enforce these agreements. In response, Schlumberger allowed him to continue working until September 1, 1999. By September there had been a dramatic upswing in the price of oil and Schlumberger was refilling its sales ranks.

During the January-February 1999 RIF, Schlumberger terminated the employment of three wireline sales engineers working in its U.S. Land – West and Alaska Geomarket ("Division"). They were: Scott Riley, age 36, grade 12; Kirk Schmidt, age 30, grade 12; and Rang, age 49, grade 14. On September 1, 1999, the date Rang's employment terminated, Schlumberger offered to rehire Scott Riley because they needed additional sales engineers. Scott Riley had a year of experience as a sales engineer. Unlike Rang, Scott Riley received his performance objectives at the beginning of 1998. Having had a year to meet them, he achieved a job performance rating of "C".

After the 1999 RIF, Poole, an Account Manager in the Rocky Mountain Sales Division, inquired of Schmidt about his willingness to return to work for Schlumberger (Schlumberger disputes this particular fact.).

Two months after Rang's employment terminated, Schlumberger hired a new field engineer to work in the Rocky Mountain Division in December 1999. Throughout the time of the 1999 RIF, Schlumberger continued to recruit engineers at Universities in the Rocky Mountain geographic area.

From the time Schlumberger informed Rang of its RIF decision, he asked to be assigned to any other job for which he was qualified – including returning to the field – and was willing to take a salary and job grade reduction. This request was ignored. Peters informed him this was only possible for employees with better career opportunities who were highly promotable. There is no job bidding system in place at Schlumberger. Transfers/promotions are left solely to management's discretion.

Mr. Gary Riley, Schlumberger's West Coast Sales Manager, a high level manager – one of the three Division Sales Managers in Schlumberger's U.S. Land – West and Alaska Geomarket until his voluntary retirement in mid-1998 – was an employee of Schlumberger for 37½ years, who bears Schlumberger no ill will. Gary Riley testified that "there is a culture of age discrimination within Schlumberger". The Rocky Mountain Division ("Geomarket") Manager at the time Schlumberger selected Rang for RIF testified that Gary Riley is a "trustworthy fellow".

After Rang's employment termination, a Schlumberger competitor agreed to hire him if he obtained a waiver

of the noncompete agreement he had with Schlumberger. Because of Schlumberger's refusal, no formal job offer was made.

## REASON FOR GRANTING WRIT

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) held that a "*prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 2109. This **evidence** permits the factfinder to infer the ultimate fact of intentional discrimination. *Ibid. Reeves* states:

> "When all the legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration".

*Id.* at 2109.

In utter disregard of *Reeves*, the Fifth Circuit directs that an employment discrimination plaintiff does not raise a genuine issue of material fact for trial if he 1) establishes a *prima facie* case; and 2) shows that each and every reason offered by the defendant for its adverse employment decision is false. According to the Fifth Circuit, such evidence has "no probative value" with respect to the ultimate question of "whether the defendant intentionally discriminated against the plaintiff." *Vadie v. Mississippi State University*, 218 F.3d 365, 372 (5th Cir. 2002).

*Vadie*, at 372, states, assuming the jury believed plaintiff had superior qualifications to the members of the preferred Anglo-Saxon class, and that the reason offered by the defendant was pretextual:

> All that it proves, however, is that [defendant's] decision-makers had some unidentifiable reason for not wanting to hire Dr. Vadie. The evidence has no probative value with respect to the ultimate question before the jury of whether there was discrimination based on national origin and an essential element for Dr. Vadie to prove. There is simply not a scintilla of evidence that Dr. Vadie's national origin played any role in any decision that the defendant made with respect to him during his tenure.

This language which the Fifth Circuit now uses as its measure for whether a jury question is presented in an employment discrimination case is a direct contradiction of *Reeves*. This heightened standard, which requires some additional evidence of discrimination beyond disproving each reason offered by a defendant for its adverse employment action, is the standard the Fifth Circuit continues to use despite this Court's having previously repudiated such an elevated standard in *Reeves*.

The Fifth Circuit's ignoring of relevant facts and its use of the *Vadie* analysis, which directly contradicts *Reeves*, warrant a reversal of the Fifth Circuit's decision affirming the grant of summary judgment in Schlumberger's favor on Rang's ADEA claim.

### 1. Rang Established A *Prima Facie* Case

In RIF cases, to establish a *prima facie* case of age discrimination the plaintiff must 1) satisfy the standing requirements of the ADEA by showing he is within the protected group and has been adversely affected by the employer's decision; 2) show he was qualified to assume another position at the time of the discharge; and 3) produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 642 (5th Cir. 1985).

In a RIF context, a plaintiff can establish a *prima facie* case "through any type of circumstantial evidence that younger employees were more favorably treated than older employees." *Id.* at 643. The critical focus is whether younger employees working in *similar* positions are retained. *Amburgey v. Cohart Refractories Corp., Inc.*, 936 F.2d 805, 807-08 (5th Cir. 1991).

#### A. Standing Requirements

Rang was 49 years of age when Schlumberger terminated his employment during the January-February 1999 RIF.

#### B. Qualified

Rang's manager, Peters, testified Rang was qualified for the position he held at Schlumberger, Sales Development

Engineer, grade 14, when Schlumberger terminated his employment. Schlumberger did not contest that Rang was qualified for his [grade 14] position.[1]

### C. Younger Employees In Similar Positions Were Retained

The group of employees ranked against one another were the "Wireline salespeople team."

**Comparable Employees Included In the RIF Group:**

| Age/Name | Grade/Title | Location |
|---|---|---|
| (49) Rang | 14/Sales Dev Eng. | Billings |
| (44) Poole | 14/Sales Dev Eng. | Denver |
| (39) Koepsell | 14/Sales Dev Eng. | Desc/Amoco |
| (39) Richards | 14/Sales Dev Eng. | Desc/Amoco |
| (38) Corbett | 13/Sr. Sales Eng. | Englewood |
| (28) Gunter | 12/Sales Eng. | Desc/Tex |
| (30) Schmidt | 12/Sales Eng. | Denver |
| (42) Miller | 12/Sales Eng. | Desc/Amoco |
| (36) Sieben | 12/Sales Eng. | Cody |

Of the 8 comparable employees, Poole, Koepsell, Richards, Corbett, Miller, Sieben, Gunter, **all of whom are younger** than Rang, **held similar positions**, i.e.,

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[1] In addition to the position Rang held, Sales Development Engineer, **grade 14**, when Schlumberger terminated his employment, Rang was also objectively qualified for other positions at the time of his discharge. Rang was qualified for other positions which he had previously held: JFE (6/24/74-12/1/74); FE (12/1/74-1/1/76); SFE (1/1/76-4/1/78); GFE (4/1/78-12/1/78); Sales Eng. (12/1/78-10/16/79); Dist. Manager (10/16/79-10/16/80); Sr. Sales Eng. (10/16/80-1/1/82); Dist. Manager (1/1/82-1/16/82); Dist. Manager (1/16/82-5/15/85); Sr. Sales Eng. (5/15/85-7/1/91).

sales engineering positions, at the time of the RIF, **and were retained or transferred**.

According to Schlumberger's objective job grade/classification system, Rang's job grade/classification – Sales Development Engineer, grade 14 – objectively qualified him for other sales engineering positions at Schlumberger at the time of the RIF.

Like Rang, most of the sales engineers were assigned to various offices scattered throughout the Rocky Mountain SubGeomarket. The Billings office, where Rang worked, was not the only office Schlumberger closed during its RIF. Two other offices closed where sales engineers included in Peters' forced-ranking worked.

Schlumberger closed the offices where Sieben, grade 12, Sales Engineer, age 36, and Richards, grade 14, Sales Development Engineer, age 39, worked. However, unlike Rang, grade 14, Sales Development Engineer, age 49, Schlumberger transferred the younger engineers, Sieben, and Richards, to other Schlumberger locations when the offices where they had worked closed.[2] Rang, a Sales Development Engineer, grade 14, was qualified to assume other positions at Schlumberger. Rang also requested a transfer, but unlike the two younger sales engineers, Rang's request was denied.

From the time Schlumberger informed Rang of its RIF decision, he asked to be assigned to any other job for which

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[2] Richards' job grade was 14. Richards' higher job grade did not preclude his transferring to a position previously held by an individual with a lower job grade.

he was qualified – including returning to the field – and was willing to take a salary and job grade reduction. This request was ignored. Peters informed him this was only possible for employees with better career opportunities who were highly promotable. There is no job bidding system in place at Schlumberger. Peters testified transfers/promotions are left solely to management's discretion. There are no safeguards designed to avert discriminatory practices. Such systems warrant careful scrutiny. *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

Rang was the only employee on the Rockies Sub-Geomarket Wireline sales team whose office closed and Schlumberger did not transfer and continue to employ.

*Thornbrough* mandates, in a RIF context, the critical focus is whether younger employees working in *similar* positions are retained. *Amburgey v. Cohart Refractories Corp., Inc.*, 936 F.2d 805, 807-08 (5th Cir. 1991) mandates a similar focus.

Rang shows that of all the comparable employees who were working in similar positions, i.e., sales engineers (Grades 12, 13, or 14 – termed, Sales Engineers, Senior Sales Engineers, and Sales Development Engineers), Rang was the oldest employee, and all of those employees Schlumberger retained in similarly situated positions were younger than Rang. The Fifth Circuit ignored these facts.

From Rang's evidence a factfinder might reasonably conclude: 1) Schlumberger intended to discriminate against Rang when it terminated his employment and retained or relocated younger engineers in similar positions; and 2) Schlumberger did not treat age as a neutral factor in its decision as to whether to retain or relocate Rang. This is all *Thornbrough* and *Amburgey require.*

Under *Thornbrough v. Columbus and Greenville R. Co.*, *supra*, *Amburgey, supra,* Rang has established a *prima facie* case of age discrimination.

The Fifth Circuit ignored these facts. However, these facts demonstrate Rang established a *prima facie* case of age discrimination and created a presumption of discrimination.

### 2. Rang Established *Pretext*

In the context of a summary judgment proceeding, the question is whether the plaintiff raises a genuine issue of fact regarding pretext. *Thornbrough*, *supra*, at 646. "A plaintiff can prove pretext in two ways, either (1) directly by persuading the court that a discriminatory reason more likely motivated the employer or (2) indirectly by showing that the employer's proffered explanation is unworthy of credence." *Amburgey, supra,* at p. 813.

Schlumberger states it terminated Rang's employment during the RIF because of his poor job performance. Rang showed this explanation was pretext for illegal age discrimination "indirectly by showing that the employer's proffered explanation is unworthy of credence."

Rang showed **each** reason Schlumberger offered to show his job performance was unsatisfactory and caused Schlumberger to select his employment to be terminated is unworthy of credence. Under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), *Thornbrough v. Columbus and Greenville R. Co.*, *supra*, and *Amburgey*, *supra*, Rang established pretext.

### A. Rang's Performance From 1991-98 Was Satisfactory Or Better

In 1991 before his transfer to Billings, Rang received a "Performance Appraisal and Development Plan" rating of "A" and was cited as "outstanding," the Sales Engineer with "probably the best [revenue] in all of NAM", Schlumberger's North American Operation.

According to Schlumberger, Rang's "Performance Appraisal and Development Plan[s]" for the years following 1992 and up through 1998 provide alleged evidence of alleged poor performance, specifically, "a need to expand the scope of the services he sold and to become up to date on new technology." No citation follows this statement. This is merely argument of counsel. No Schlumberger manager ever made such a statement.

Rang had three managers while in Billings: Wayne Richards, Mo Cordes, and Dwight Peters. Throughout 1991-1998, both Richards and Cordes recommended Rang for merit raises. Schlumberger appraised Rang's job performance "as a normal progression of a Sales Development Engineer performing at the expected level." Merit raises mean Schlumberger was satisfied with Rang's job performance.

Throughout 1991-1999, Rang was up to date on Schlumberger's new technology, and successfully sold Schlumberger "Key Services" and "new technology" while assigned to the Billings area "Williston Basin". Rang's "Performance Appraisal and Development Plan[s]" dated 1/15/90, 1/10/91, 12/1/91, 1/7/93, 1/19/95, 1/3/97, 1/9/98, document his successful performance at Schlumberger. Nothing in Rang's personnel file and specifically the "Performance Appraisal and Development Plan[s]" suggests

that for several years prior to the termination of his employment Rang was in any manner technologically deficient or unable to sell Schlumberger's "new technology."

From 1991-1998, no manager ever made any statement that Rang was in any manner technologically deficient or unable to sell Schlumberger's "new technology". No one at Schlumberger, in Rang's chain of command, ever made any statement that Rang was technologically deficient or unable to sell Schlumberger's "new technology" or "Key Services".

| ELA | Rev Date | Rating | Comments |
|---|---|---|---|
| 47.9% | 1-7-93 | C | "Average year for Montana" |
| – | 1-12-94 | – | (Document not produced) |
| 63.35% | 1-19-95 | C | "total revenue at plan" |
| 62% | 1-3-97 | C | "Good Work" |
| 72% | 1-9-98 | C | "Excellent Year" |

As the evidence shows, Rang had satisfactory or good performance from 1991-1998. Schlumberger's argument that Rang had poor performance from 1992-1998 is unworthy of credence.

### B. Schlumberger's Assertion That Rang's 1999 Poor Work Performance Was The Reason He Was RIFed Is Unworthy Of Credence

According to Peters, Rang's job performance was poor, and for this reason he rated Rang's job performance a "D" in 1999 because of his "total lack of initiative to do anything about it or to get out and see customers." Peters states that when he accompanied Rang on visits to clients in the Billings area during 1998 "some acted surprised to see anyone from Schlumberger", some "would hint . . . that

they were not used to seeing Rang", saying " . . . Craig, haven't seen you in a while. We were planning on doing some work. I was wondering when somebody would call on me. . . . Statements like that."

Rang testified:

> When I took Mr. Peters out on sales calls in the Billings area, no client ever said to him or me "Craig, haven't seen you in a while. . . . We were planning on doing some work. I was wondering when somebody would call on me". . . . I was present at all times with Mr. Peters. According to Mr. Peters the statements were directed to me, therefore I would have had to be present when the purported statements were made. No such statements ever were made.

Peters statement is simply not credible. Such a serious offence by Rang, whose solo responsibility was to call on clients and sell Schlumberger services, would not have been permitted to continue for a full year. Such an offense would have been a serious performance issue which, at a minimum, would have been documented and subjected Rang to disciplinary procedures, which are highly developed at Schlumberger. As the U.S. Land – West and Alaska Division Manager, Richards, testified, Schlumberger would not hesitate to terminate employment if a serious offense occurred.

Furthermore, if in fact Peters really believed Rang was not calling on clients, he surely would have noted this serious offense on Rang's 1999 performance appraisal. However, Peters made no mention whatsoever of this

serious offence on Rang's 1999 performance appraisal or cn any other document.[3]

Regarding Rang's "supposed lack of initiative" and failure to call on Schlumberger's clients, Thomas M. Hauptman, President of KGH Operating Company, testifies:

> Mr. Rang made a point of stopping by our office on a very routine basis to determine if our company had any upcoming projects which might have required the services of Schlumberger.

John E. Grauman, Jr., Petroleum Geologist, testifies:

> Up until his departure, most logging jobs were awarded to Schlumberger not on the basis of cost, as Schlumberger was usually the highest bidder, but instead of the personal attention provided by Mr. Rang. I did not have to call Schlumberger to get a bid, because Mr. Rang would invariably find out that a well had been permitted and he called me first. . . . I would certainly contest the assertions made by Mr. Peters as to Mr. Rang's initiative. I seldom went a month without a call from Mr. Rang.[4]

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[3] "When an employer's stated motivation for an adverse employment decision involves the employee's performance, but there is no supporting documentation, a jury can reasonably infer pretext." (*Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1195 (citing *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 124 (5th Cir. 1992)).

[4] Additional affidavits testifying to Mr. Rang's initiative and technical expertise were cited to the District Court and the Fifth Circuit [Reinschmidt, Van Delinder, Campen, Croft, Chaky, and Gimza].

In fact, as the testimonies above and Rang's sales statistics "ELA" show, Rang demonstrated extraordinary initiative. From this evidence, a reasonable factfinder could decide that Peters' statement that Rang was not calling on clients is unworthy of credence.

Peters' statement is belied by the fact that Peters, himself, had to approve Rang's monthly expense reports. These reports document the miles Rang drove to see clients and show Rang drove 35% more in 1998 (1999 Performance Appraisal and Development Plan) than in 1997. Rang's expense reports show:

| ELA | Date | Grade | Miles | Merit Raise |
|---|---|---|---|---|
| 62% | 1-3-97 | C | 39375 | Yes |
| 72% | 1-9-98 | C | 32857 | Yes |
| 83% | 1-12-99 | D | 44451 | No/Fired |

This phenomenal effort produced results: Rang's ELA[5] increased by 11%.[6] Rang increased his ELA through additional driving on treacherous snow and ice covered secondary roads.[7] Peters personally approved and authorized reimbursement to Rang for each of these 44,451 miles. Peters acknowledged he received a monthly letter from Rang summarizing his sales activity, including clients seen

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[5] This ELA reflects that Rang sold Schlumberger services on 83 out of 100 wells drilled in his area.

[6] Rang's ELA ("estimated logging activity") increased by 11%, from 72% to 83% (January 12, 1999 "Performance Appraisal and Development Plan") the year he was terminated.

[7] A listing of clients in the area provided by Schlumberger indicates that no major oil companies were operating in this area. Thus, Rang garnered this high ELA through many sales to small operators. Rang reported this activity in his monthly letters and expense reports.

each month. From this evidence, a reasonable factfinder could decide: 1) Peters' statement that Rang showed a "total lack of initiative to do anything about it or to get out and see customers" is unworthy of credence; 2) Peters, himself, did not believe Rang was not calling on clients, and Rang was not selected to be RIFed because of poor work performance; and 3) based on the falsity of the explanation that Schlumberger is lying to mask its true discriminatory purpose.

Schlumberger maintains Rang failed to establish pretext with respect to each of the reasons offered by Peters for Rang's "D" rating. Peters had no explanation for claiming Rang had poor job performance other than "total lack of initiative to do anything about it or to get out and see customers". Peters testified that the lack of initiative encompassed "lack of activity" and "to blame others . . . and not . . . do something about it." Peters testified the way he reflected this on Rang's evaluation was by noting Rang needed development in "creativity" and "initiative" as well as "short term planning".

As to Peters' claim he could see a *lack of activity* from Rang's expense reports, the reports objectively show the miles Rang traveled seeing clients increased from 32,857 miles in 1997 to 44,451 miles in 1998. Peters testified he reviewed and approved these expense reports which supported his "perception" or "assessment" that Rang was not calling on clients. However, Rang's expense reports provide objective evidence that Peters' testimony is unworthy of credence.

The evidence shows Peters' explanation of the "D" job performance rating and his assertion Rang was RIFed because of poor work performance is not credible. None of

the objective factors on which he claims he based the rating, or "assessment" – client comments, whether Rang increased his market share in 1998, and Rang's expense reports/monthly letters – support his explanation.

Though Peters only gave the two reasons fully discussed above, if Schlumberger maintains "creativity" and "initiative" as well as "short term planning" deficiencies show Rang's job performance was poor and for this reason Schlumberger selected his employment to be terminated, Rang has addressed "initiative" above.

As to "creativity", Rang's receipt of "Wildcatters" addressed this fact. Noted on the "Performance Appraisal and Development Plan", dated January 9, 1998, are the two "Wildcatter application[s]". The manager wrote "Excellent work". Receipt of a "Wildcatter Award" at Schlumberger is indicative of creativity, initiative, expertise and proficiency in understanding Schlumberger's technology. Rang also testified he had been selected to receive a "Wildcatter Award" for his work in 1998.

Regarding short term planning, in one year Rang increased his ELA – market share-by 11%; increased calling on clients as shown by his expense reports and mileage tally – 11594 miles – from the previous year; conducted nine seminars *without being directed to do so*; and earned a "Wildcatter Award". By these measures, any assertion he did not plan his year well is unworthy of credence.

If "blamed others for his problems" is somehow claimed as indicative of poor work performance, Rang, for the only time during his twenty-five appraisals at Schlumberger, wrote a comment on his 1999 Performance Appraisal about a serious field performance issue, where no

corrective action had occurred. He testified about this issue also – the Completions Specialist assigned to perform work on jobs Rang sold had serious field performance problems that resulted in lost sales. For Rang's notifying operations about the problem, Peters reprimanded him on his 1999 Performance Appraisal. Gimza also testified about Rang doing the "Completions Specialist" job at the wellsite to correct a major problem that had occurred at the wellsite when that employee threatened to walk off the job.

Rang shows each reason Peters offered: for rating Rang's job performance "D", for substantiating Rang's "D" job performance rating, and for selecting Rang to be RIFed because of alleged poor work performance, is unworthy of credence.

### C. Other Pretext Evidence: Objective Criteria Show Rang Was Clearly Better Qualified

*Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 42 (5th Cir. 1996) and *Amburgey*, *supra* at p. 614, provide pretext may be established by showing a plaintiff is "'clearly better qualified' than younger employees who were retained." Specific reasons concerning the relative qualifications will establish a fact question. *Id.*

Gary Riley examined objective criteria – the job grade/classifications and comparative work performance of younger employees whom Schlumberger retained at the time of the RIF. He testified Rang was "much better qualified" than certain younger employees who were retained. Schlumberger did not refute Gary Riley's testimony. Rang was objectively "clearly better qualified" than Corbett (age 38, grade 13, Sr. Sales Eng.), Gunter (age 28,

grade 12, Sales Eng.), Miller (age 42, grade 12, Sales Eng.), and Sieben (age 36, grade 12, Sales Eng.).

## CONCLUSION

The Fifth Circuit's ignoring of relevant facts and its use of the *Vadie* analysis, which directly contradicts *Reeves*, warrant a reversal of the Fifth Circuit's decision affirming the grant of summary judgment in Schlumberger's favor on Rang's ADEA claim.

This Honorable Court should grant this Petition and review the decision below. Employment discrimination plaintiffs within the Fifth Circuit must be governed by the standard set out by this Court in *Reeves*, *supra,* rather than the Fifth Circuit in *Vadie, supra*.

Respectfully submitted,

ROGER D. PHIPPS
EVANTHEA P. PHIPPS
PHIPPS & PHIPPS
210 Baronne Street
Suite 1410
New Orleans, Louisiana 70112
(504) 899-0763

*Counsel for Petitioner*

No. _____

In The
# Supreme Court of the United States

CRAIG LYNN RANG,

*Petitioner,*

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-21201
Summary Calendar

CRAIG RANG,

Plaintiff-Appellant,

versus

SCHLUMBERGER TECHNOLOGY CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas USDC No. H-00-CV-4388

(Filed Oct. 21, 2002)

Before BARKSDALE, DeMOSS, and BENAVINDES, Circuit Judges.

PER CURIAM:*

In this appeal, plaintiff argues that there are disputed material facts in existence regarding the following issues: (i) whether plaintiff has satisfied the *prima facie* elements of his ADEA case; (ii) whether defendant's proffered legitimate nondiscriminatory reason for terminating plaintiff was mere pretext for illegal age discrimination; (iii) whether defendant engaged in illegal retaliation; (iv)

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

whether plaintiff was wrongfully discharged under Montana law, (v) whether defendant's covenant not to compete to which plaintiff agreed is valid; and (vi) whether the district court abused its discretion during discovery.

The district court appropriately concluded that plaintiff is unable to satisfy the *prima facie* requirements of his ADEA claim. To establish his *prima facie* case, plaintiff must prove: (1) that he was discharged; (2) that he was qualified for his position; (3) that he was within the protected class; and (4) that he was (a) replaced by someone outside the protected class, or (b) replaced by someone substantially younger, or otherwise discharged because of his age. *See Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 992 (5th Cir. 1996); *Reeves v. Sanderson Plumbing,* 530 U.S. 133 (2000). Plaintiff's argument is limited to his assertion that defendant's employment evaluations were incorrect, rather than identifying facts supporting his claim that he was discharged because of his age or replaced by someone younger. Plaintiff's assertions cannot adequately support his ADEA *prima facie* case.

Even if plaintiff could satisfy the ADEA's *prima facie* elements, his ADEA claim would not prevail because he cannot show that defendant's legitimate nondiscriminatory reason – i.e., reduction in force – was mere pretext for illegal discrimination. Plaintiff essentially disputes defendant's assessment of his work performance, which under established precedent is insufficient to support an inference of pretext. *See Shackelford v. Deloitte & Touche, L.L.P.,* 190 F.3d 398, 408 (5th Cir. 1999); *see also Vadie v. Mississippi State Univ.,* 218 F.3d 365, 374 (5th Cir. 2000) (holding that a plaintiff can avoid summary judgment in an age discrimination case only if the evidence: (1) creates a factual issue as to whether each of the employer's stated

reasons was what actually motivated the employer; and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complaints). Furthermore, defendant's rehiring of another individual with higher performance ratings is insufficient to prove pretext. *See id.; see also Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 301 (5th Cir. 2000).

Plaintiff's claim for retaliation also fails, as the relevant ultimate employment action – plaintiff's being terminated – occurred prior to any protected activity. Furthermore, the record is devoid of any evidence of causation or retaliatory animus with respect to a claim of retaliation. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 708 (5th Cir. 1997); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995); *Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1991).

Plaintiff's wrongful discharge claim also was properly dismissed because that cause of action, by its terms, does not apply to a discharge "that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. Such statutes include those . . . that prohibit unlawful discrimination based on . . . age." Mont. Code § 39-2-912; *see also Tonack v. Montana Bank of Billings*, 854 P.2d 326, 331 (Mont. 1993). Plaintiff's sole theory of recovery for his termination is based on an allegation of age discrimination. As the ADEA covers such charges of discrimination, the Montana wrongful termination statute, by its terms, cannot. *See id.*

It is also clear that the covenant not to compete in issue here is acceptable under Montana law. Under Montana law, covenants not to compete are enforceable when they (i) are signed at or near the onset of employment;

(ii) are limited in time or geographic scope; (iii) are based upon good consideration; and (iv) afford reasonable protection without imposing any unreasonable burdens. *See Daniels v. Thomas, Dean & Hoskins, P.C.*, 804 P.2d 359, 370 (Mont. 1990); *Dobbins, DeGuire & Tucker, P.C. v. Rutherford*, 708 P.2d 577 (Mont. 1985).

Additionally, nothing indicates that the district court abused its discretion during discovery. Thus, the district court's decisions should be affirmed, as they are neither arbitrary nor clearly unreasonable. *See Moore v. Willis Indep. School Dist.*, 233 F.3d 871, 876 (5th Cir. 2000); *Kelly v. Syria Shell Petroleum Development*, 213 F.3d 841, 855 (5th Cir. 2000).

Finally, plaintiff also asserts a number of other claims, such as (i) that evidence was improperly excluded, (ii) that defendant failed to provide required documents, and (iii) that the district court made improper determinations of credibility. None of these arguments bears any merit.

Accordingly, the district court's holding is AFFIRMED.

| UNITED STATES DISTRICT COURT | SOUTHERN DISTRICT OF TEXAS |
|---|---|

| | | |
|---|---|---|
| CRAIG RANG, | § | CIVIL CASE H-00-4388 |
| Plaintiff, | § | |
| *versus* | § | |
| SCHLUMBERGER TECHNOLOGY CORP., | § | |
| Defendants. | § | |

**Final Judgment**

Craig Rang takes nothing from Schlumberger Technology Corp.

Signed November 5, 2001, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-21201

CRAIG RANG

Plaintiff - Appellant

v.

SCHLUMBERGER TECHNOLOGY CORPORATION

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas, Houston

**ON PETITION FOR REHEARING**

(Filed Nov. 21, 2002)

Before BARKSDALE, DeMoss and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Supreme Court, U.S.
FILED
APR 24 2003
OFFICE OF THE CLERK

No. 02-1230

IN THE

# Supreme Court of the United States

CRAIG LYNN RANG,

*Petitioner*,

*v.*

SCHLUMBERGER TECHNOLOGY CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

PAUL E. HASH
*Counsel of Record*
CHRISTINA A. JUMP
DAVID A. SCOTT
JACKSON LEWIS LLP
3811 Turtle Creek Boulevard
Suite 500
Dallas, Texas 75219
(214) 520-2400

*Counsel for Respondent*

180487

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

1. Did the Fifth Circuit employ a "pretext plus" analysis in reviewing the District Court's summary judgment against Petitioner?

2. Whether the Fifth Circuit erred in affirming the District Court's summary judgment against Petitioner.

## STATEMENT PURSUANT TO RULE 29.6

The Respondent is Schlumberger Technology Corporation, a wholly owned subsidiary of Schlumberger, Limited, a publicly traded corporation listed on the NYSE by the symbol, "SLB" and also listed on the Paris, London, Amsterdam and Swiss Stock Exchanges.

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## SUMMARY OF THE ARGUMENT

### A. The Petitioner Failed To Establish A *Prima Facie* Case

The Fifth Circuit appropriately found that the Petitioner failed to establish a *prima facie* case. Specifically, the Petitioner failed to offer evidence that he was replaced by someone outside the protected group, or was otherwise discriminated against because of his age.

### B. The Relevant Standard

The Petitioner misstates the standard applied by the Fifth Circuit in ruling that the District Court's grant of summary judgment was appropriate. According to the Petitioner, the Fifth Circuit held that evidence of the falsity of each and every reason offered by the Respondent for its adverse employment decision has "no probative value" with respect to the question of whether the Respondent intentionally discriminated against the Petitioner. The Fifth Circuit made no such holding, either in the present case or in *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2002).

### C. The Petitioner Did Not Establish Pretext

The Fifth Circuit did not err in holding that Petitioner failed to establish that Respondent's articulated reason for laying him off was a pretext for intentional age discrimination. The Petitioner failed to offer probative evidence that Schlumberger's assessment of Petitioner's performance was false. Petitioner's argument amounted to little more than quibbling over Respondent's assessment of his performance, which is insufficient to establish pretext under existing precedent.

## STATEMENT OF THE CASE

Respondent, Schlumberger Technology Corporation (hereafter "Respondent" or "Schlumberger") is an oil well service company based in Houston, Texas. While Schlumberger offers a variety of products and services, the bulk of its work involves "wireline service," which is essentially technology for servicing oil wells and exploring for oil and gas in drilled wells. The Petitioner, Craig Rang (hereafter "Petitioner" or "Rang") began working for Schlumberger in 1974 as a Sales Engineer. Rang's employment as a Sales Engineer, as well as his subsequent positions, generally involved the sale of Schlumberger's wireline products and services. By 1999, Rang held the position of "Sales Development Engineer" with Schlumberger in the "Williston Basin" area that encompassed the states of Montana, North Dakota and the northern halves of South Dakota and Utah.

By 1999, Rang's supervisor was Dwight Peters, the Wireline Sales Manager. Peters became Rang's supervisor in 1998. Prior to Peters becoming Rang's supervisor, Rang had received some satisfactory performance evaluations and some above average evaluations. However, Peters did not assess Rang's performance as highly. Peters gave Rang a "D" rating, which indicated that development was needed in Rang's performance. Despite Rang's attempt to characterize the basis for Peters' low rating of his performance as relating to only one area, there were actually several areas in which Peters felt Rang had underperformed. Among these areas were Rang's overall sales performance, Rang's failure to sell "key services,"[1] and a "lack of initiative" in terms of generating business.

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1. "Key services" consisted of new technology designed to increase production from existing wells.

In 1998, the price of domestic crude oil dropped substantially, and consequently, Schlumberger's overall business declined. As a result of this business decline, Schlumberger instituted a nationwide reduction in force. To facilitate the reduction in force, local management was assigned the task of determining the number of employees necessary to achieve a certain cost reduction and selecting the employees who would be laid off. This task fell to Peters for the employees in his division.

Peters determined that three out of the thirteen employees in his operating division would need to be laid off. To select who would be laid off, Peters conducted a "forced ranking" of the employees in his division, ranking them by their most recent performance appraisals. Rang had the lowest performance appraisal in his group. The three individuals ultimately selected by Peters for layoff were Rang, age 49, Scott Riley, age 36, and Kirk Schmidt, age 30. Scott Riley was laid off in January of 1999 and Schmidt was laid off in February of 1999. Peters allowed Rang to remain on the roll of employees until Rang reached his fiftieth birthday so he could qualify for continuing medical benefits. Rang's last day of employment was in August, 1999. Scott Riley was later offered a job and subsequently hired in another Schlumberger department.

Schlumberger strongly disagrees with two factual representations made by Rang in his Petition. First, Rang claims that Schlumberger replaced him. Second, Rang claims that Schlumberger offered Schmidt another job. No one was hired to replace Rang; his functions were assumed by existing personnel. There is no record evidence of anyone being hired to replace Rang. Moreover, Schmidt was not offered a job by Schlumberger. The record evidence establishes that a

Schlumberger employee with no hiring authority named Joe Poole had a social lunch meeting with Schmidt, and during the meeting, simply asked Schmidt if he would ever have any interest in returning to work at Schlumberger. There was no "job offer" made to Schmidt.

Rang instituted this action in the United States District Court for the Northern District of California on March 29, 2000. Venue of the case was changed on Schlumberger's motion to the United States District Court for the Southern District of Texas. Rang's lawsuit urged causes of action for age discrimination under the ADEA, retaliation under the ADEA, and various causes of action under Montana state law. Following substantial discovery, which included Rang taking three depositions, including the deposition of Dwight Peters, and receiving over eight hundred pages of documents, Schlumberger filed a motion for summary judgment as to all of Rang's claims. In response to Schlumberger's motion for summary judgment, Rang urged that a triable issue of fact existed with regard to the ADEA claim because he had established that Schlumberger's articulated reason for the "D" rating on his performance evaluation, and thus his subsequent selection for layoff, was a pretext for age discrimination. The District Court granted summary judgment in favor Schlumberger on November 5, 2001.

Rang appealed the District Court's summary judgment to the Fifth Circuit Court of Appeals. On October 21, 2002, a panel of the Fifth Circuit Court of Appeals issued a *per curiam* opinion affirming the District Court's ruling, finding that Rang had failed to establish a *prima facie* case, and additionally, finding that Rang had failed to create a triable issue of fact with regard to his age discrimination claim. Thereafter, Rang submitted his Petition for Writ of Certiorari to this Court.

## ARGUMENT

### A. Rang Did Not Establish A *Prima Facie* Case

The Fifth Circuit held that summary judgment in favor of Schlumberger was correct because Rang had failed to establish his *prima facie* case. Specifically, the Fifth Circuit held that to establish this *prima facie* case, Rang must prove: (1) that he was discharged; (2) that he was qualified for his position; (3) that he was within a protected class; and (4) that he was (a) replaced by someone outside the protected class, or (b) replaced by someone substantially younger, or otherwise discharged because of his age. (*See* Pet'r. App. at A2).

While there is no evidence that Rang was replaced by someone outside the protected class, there is evidence that younger employees were retained in "similar" positions by Schlumberger. The Fifth Circuit, however, found that no *prima facie* case existed because there was no probative evidence to support an inference that age was a determining factor in the selection of Rang for layoff. A review of the cases cited by Rang, as well as the more recent Fifth Circuit authority on the subject, establishes that the Fifth Circuit's rationale in finding that Rang had failed to establish a *prima facie* case is sound.

In *Williams v. General Motors*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982), the Fifth Circuit modified the *McDonnell Douglas* burden shifting analysis in the context of reduction in force cases. The Fifth Circuit held that the *prima facie* case could be satisfied by a plaintiff establishing: (1) that he was within a protected group; (2) that he had been adversely

affected; (3) that he was qualified to assume another position at the time of the layoff; and (4) by the production of evidence "circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Williams*, 656 F.2d at 129. Effectively, the *Williams* court allowed a plaintiff to establish a *prima facie* case through circumstantial evidence that younger employees were treated more favorably. This could be accomplished by evidence leading to the conclusion that the defendant consciously refused to consider retaining or relocating an employee because of his age or that the defendant regarded age as a negative factor. *Williams* at 129-30.

The *Williams* decision was stretched "to its limit" by *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633 (5th Cir. 1985), where the Fifth Circuit allowed an employee to establish a *prima facie* case by proving that he had been laid off while younger, less qualified employees were hired immediately following the plaintiff's layoff.

The Petitioner fails to bring to the Court's attention the more recent cases addressing the plaintiff's *prima facie* case in a reduction in force context. Two important opinions have been issued by the Fifth Circuit subsequent to *Williams* and *Thornbrough*. In *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 995 (5th Cir. 1993), the Fifth Circuit found that an ADEA plaintiff failed to establish a *prima facie* case where he submitted an affidavit wherein he opined that he was better qualified than a younger employee who was retained. *Id.* at 959. The *Bodenheimer* court held that such evidence does not establish the *prima facie* case unless the evidence establishes that the plaintiff was "clearly better qualified" than the employee retained. *Id.* Moreover, Bodenheimer

offered the affidavits of two customers, similar to the Petitioner's evidence in the present case, who opined that the plaintiff provided better quality service than did the retained employee. *Id.* The Fifth Circuit found this evidence unpersuasive as well. *Id.*

In *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38 (5th Cir. 1996), the Fifth Circuit again addressed the *prima facie* case in a reduction in force environment. The plaintiff in *Nichols* was laid off while three less experienced employees were retained in similar positions at the same location. *Id.* at 42. Nichols argued that his greater experience in the same positions as those held by the younger, less experienced, retained employees established that he was clearly better qualified. *Id.* The Fifth Circuit again found that this argument lacked merit. *Id.* The court held that the plaintiff's equating years served with superior qualifications was erroneous, as the court in *Bodenheimer* held that greater experience alone will not suffice to raise a fact issue. *Id.*

A review of *Bodenheimer* and *Nichols* in relation to the present case establishes that the quality of evidence offered to support the *prima facie* case by the Petitioner is no more persuasive than that offered by the plaintiffs is those cases. To fend off summary judgment, Rang offered nothing more than his own subjective assessment of his qualifications, conclusory affidavits from a few Schlumberger customers and one former manager who thought Rang did good work, and an argument that his years of experience and tenure in the jobs held by retained employees made his "superior qualifications" beyond doubt. Despite this, Rang failed to prove through specific evidence that he was "clearly better qualified" than the younger employees retained by Schlumberger. This is established by the very fact that Peters had ranked Rang's performance the lowest of the thirteen employees in his group. Thus, Rang is left with his

remaining contention that he was "qualified" to fill the other jobs in which the younger employees were retained simply because he had held them before. Rang offered little more than the length of his service and positions he held to support his claim of superior qualification. Peters' ranking was not based upon experience, but upon current performance. Absent establishing that each and every stated reason by Peters for ranking Rang with a "D" was a pretext, Rang's argument must fail.

Rang relies heavily on the Fifth Circuit's opinion in *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805 (5th Cir. 1991), for the argument that Schlumberger's retaining younger employees working in similar positions to Rang is sufficient to establish the *prima facie* case. Ironically, the very case Rang relies upon actually harms his position. In *Amburgey*, the plaintiff was laid off while arguably less qualified employees with less seniority were allowed to transfer following the plant closing and reduction in force that resulted in Amburgey's loss of employment. *Amburgey*, 936 F.2d at 807. Amburgey was clearly qualified for three of six jobs allegedly filled by less senior and younger employees. *Id.* However, the distinction between *Amburgey* and the present case is that there were no material facts at issue with regard to Amburgey's qualifications. *Id.* at 812. In the present case, Rang had been rated as a lower performer than the less senior and younger employees who were retained by Schlumberger. While Rang may dispute the accuracy of Peters' assessment of his performance, the fact still remains that Peters had deemed Rang less qualified, and thus, Rang was more likely to be laid off.[2]

2. Rang ignores the fact that he *was* treated the same as employees outside his protected age group: both Riley and Schmidt were under forty, had higher performance ratings than Rang, and were also laid off in the same process. Additionally, two employees over forty in Peters' group were not laid off.

The Fifth Circuit's holding that Rang failed to establish a *prima facie* case is a result of the quality of his evidence as a whole. Instead of offering specific comparative evidence regarding his qualifications in relation to other retained employees, Rang focused on establishing that Peters' assessment of his performance was unfair or inaccurate.[3] Having failed to sufficiently establish that he was in fact clearly better qualified at the time of the layoff decision than the employees who were retained, the Fifth Circuit's opinion was correct.

Rang failed to establish a *prima facie* case of discrimination under the ADEA. Therefore, the Fifth Circuit correctly affirmed the District Court's summary judgment against Rang.

### B. Petitioner Misconstrues This Court's Opinion In *Reeves* And The Fifth Circuit's Opinion In *Vadie*

The Petitioner argues that the Fifth Circuit, in *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2002), disregards this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). A review of this Court's opinion in *Reeves*, and the Fifth Circuit's *Vadie* opinion, reveals that the Petitioner has misinterpreted both cases.

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3. As noted in *Bodenheimer*, the plaintiff should offer specific evidence comparing his ability to perform the job superior to that of the retained employee. *Id.* at 959. Rang did not do this.

### 1. The *Reeves* Opinion

In *Reeves*, this Court granted certiorari to decide whether a verdict favorable for a plaintiff in an age discrimination claim was properly reversed by the Fifth Circuit Court of Appeals.[4] In *Reeves*, the employer offered several grounds for its termination decision, each of which was disproven by Reeves during trial. Additionally, Reeves offered substantial and compelling evidence of age-related animus by his employer, manifested in statements by his supervisor of a highly discriminatory nature. The jury returned a verdict in Reeves' favor. However, despite Reeves' successful contradiction of each of the employer's proffered nondiscriminatory reasons, and in disregard of the substantial evidence of age-related animus, the Fifth Circuit reversed the jury's verdict.

In reversing the opinion of the Fifth Circuit, this Court held that a fact finder's rejection of a defendant's proffered reason will permit an inference of the ultimate fact of intentional discrimination, citing the Court's opinion in *St. Mary's Honor*

4. The *Reeves* opinion was related to the review of a judgment as a matter of law following an adverse jury verdict under Federal Rule of Civil Procedure 50. While the standard for reviewing a court's grant of summary judgment is the same as a judgment under Rule 50 (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)), it is important to note the context in which the rulings have occurred. The plaintiff in *Reeves* provided sufficient evidence to get to a jury, which then found in his favor, before the Fifth Circuit reversed despite substantial evidence of discrimination. In the present case, the District Court granted summary judgment, and the Fifth Circuit affirmed, after the Petitioner did nothing more than argue that he thought he did a better job than was reflected in his supervisor's assessment of his work. Rang's purported evidence of pretext was nowhere near the quantum or quality of the plaintiff's evidence in *Reeves*.

*Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). However, this Court also held:

> This is not to say that such a showing by the Plaintiff will always be adequate to sustain a jury's finding of liability. **Certainly there will be instances where, although the Plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the Defendant's explanation, no rational fact finder could conclude that the action was discriminatory.** For instance, an employer would be entitled to judgment as a matter of law if the record conclusively reveals some other, non-discriminatory reasons for the employer's decision, or if the Plaintiff created only a weak issue of fact as to whether the employer's reason was untrue, and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

*Reeves*, 120 S. Ct. at 2109 (emphasis added).

Obviously, this Court's opinion in *Reeves* did not provide, as the Petitioner asserts, that a judgment in favor of the defendant is *never* appropriate where the plaintiff has questioned the legitimacy or wisdom of the defendant's proffered non-discriminatory reason. Such a ruling would establish the dangerous policy, specifically noted and rejected by this Court in *Reeves*, that a triable fact issue exists in every case where the plaintiff disagrees with his employer's assessment of his work; this approach would "insulate an entire category of employment discrimination cases from review under Federal Rule of Civil Procedure 50 . . ." *Id.* The Court reiterated that trial courts "should not treat

discrimination differently from other ultimate questions of fact." *Id.*

### 2. The Fifth Circuit's Opinion In *Vadie*

The Fifth Circuit issued its opinion in *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2000), about one month after this Court's opinion was issued in *Reeves*.[5] The *Vadie* opinion, like *Reeves*, was the Fifth Circuit's review of a jury verdict, rather than the review of a summary judgment. Vadie complained of national origin discrimination and retaliation. The jury returned a verdict in favor of Vadie on both counts. However, Vadie's evidence of national origin discrimination largely consisted of his disagreement with the defendant's assessment that Vadie was less qualified for a tenured professorship than was the individual ultimately selected. Essentially, Vadie simply argued that the University's decision was wrong, and thus, must have been the result of national origin discrimination and retaliation. Vadie offered no evidence of discriminatory animus otherwise. In reversing the jury's verdict on national origin discrimination, the Fifth Circuit reasoned:

> Viewing the evidence as a whole, as we must, there is nothing probative anywhere in the record of the

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5. While the Petitioner asserts that the Fifth Circuit "disregards" the *Reeves* opinion, a review of *Vadie* reveals that the Fifth Circuit carefully considered *Reeves* in its opinion. The Fifth Circuit noted that this Court's rationale in *Reeves* was consistent with its *en banc* opinion in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996), wherein the Fifth Circuit held that the plaintiff's *prima facie* case in tandem with evidence allowing rejection of each of the employer's proffered reasons will usually permit a finding of discrimination. *Vadie*, 218 F.3d at 382 n.23.

> ultimate question of national origin discrimination. Dr. Vadie argued that Dr. Zappi, who had no teaching experience, was not qualified for the 1995 position and was certainly no match for Dr. Vadie's own record of success in research and teaching. He further asserted that when MSU advertised for the 1993 position a Ph.D. in Chemical Engineering was not required and that the addition of such a requirement for the 1995 position was pretextual . . . the evidence has no probative value with respect to the ultimate question before the jury of whether there was discrimination based on national origin . . . there is no evidence in the record that the Defendant ever adversely considered national origin with respect to any of its faculty.

*Vadie*, 218 F.3d at 373.

In the present case, the Petitioner's characterization of the Fifth Circuit's opinion in *Vadie* is wrong. The Petitioner argues that the Fifth Circuit held that a plaintiff's establishing the falsity of each and every reason offered by a defendant for the adverse employment action has no probative value with respect to the ultimate question of whether the defendant intentionally discriminated against the plaintiff. (Pet'r. Br. at p. 10). However, a reading of *Vadie* establishes that the Fifth Circuit held that Vadie's quibbling over the University's assessment of his qualifications in relation to the professor ultimately chosen offered no probative value. As in the Petitioner's case, Vadie offered no other evidence of any probative value, such as discriminatory remarks, to support his case: he simply argued over the wisdom of the defendant's employment decision. The Fifth Circuit correctly found no merit in such an approach.

### C. The Fifth Circuit Did Not Apply A "Pretext Plus Analysis" In Reviewing Summary Judgment In This Case.

In his Petition, Rang asserts that the Fifth Circuit applied a "pretext plus" analysis in reviewing the District Court's summary judgment against him. However, a review of the Fifth Circuit's opinion reveals that no such analysis was employed.

The District Court did not issue a memorandum opinion supporting its summary judgment against Rang. Therefore, the Fifth Circuit had to review and consider each of the grounds advanced by Schlumberger in support of its motion for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Fifth Circuit first correctly noted that Rang failed to establish a *prima facie* case since Rang limited his argument to asserting that Schlumberger's assessment of his performance was incorrect. However, the Fifth Circuit went further to analyze whether Rang had submitted sufficient evidence to establish that Schlumberger's proffered non-discriminatory reason was a mere pretext for discrimination. The appellate court correctly found that Rang was unable to establish pretext merely by disputing Peters' assessment of his work performance. The Fifth Circuit specifically noted that Rang had failed to create a fact issue as to whether each of Peters' stated reasons was what actually motivated Schlumberger to select him for layoff, and found that Rang's evidence did not create a reasonable inference that age was a determinative factor in the layoff decision affecting him.

It is important to note that nowhere in the Fifth Circuit's opinion does it hold that Rang had established a case of

pretext, but then required Rang to produce further evidence of discriminatory animus to defeat Schlumberger's summary judgment evidence. On the face of the Fifth Circuit's *per curiam* opinion, it is obvious that the court never went that far, because it never found that Rang established a *prima facie* case or pretext in the first instance. Simply put, there is no pretext plus analysis in the Fifth Circuit's opinion, and Rang has simply phrased his brief to create the image of such an analysis in order to justify *Certiorari* being granted in this case. However, granting *Certiorari* in this case is not appropriate, as this case presents no issue worthy of Supreme Court review.

## D. Petitioner Did Not Establish Pretext

In the Petitioner's Brief, he dedicates approximately nine pages of text toward his assertion that he established Schlumberger's proffered explanation for selecting him for layoff was a pretext for intentional age discrimination. When the facts in the record are considered in light of the relevant law, Petitioner's argument clearly is without merit.

### 1. Disputing Perceived Performance Does Not Equate To Pretext

Rang seeks to have the opinions of the District Court and Fifth Circuit reversed simply by attacking Peters' assessment of his performance, and not by showing any true pretext or connection between the actions about which he claims and the discrimination he alleges. This is not in accord with this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). As set forth above, the *Reeves* opinion recognized there will be instances where no rational factfinder could

conclude that the action was discriminatory even though a plaintiff established pretext. *Id.* at 148. Further, the Court was careful to note that it was not, by its opinion, insulating an entire category of cases from the application of Rule 50. The federal courts have uniformly held that the civil justice system should not act as a vehicle for second guessing employment decisions, however erroneous those decisions may be. *Kearney v. Town of Warcham*, 316 F.3d 18, 25 (1st Cir. 2002); *Gonzalez v. El Dia, Inc.*, 304 F.3d 63, 69 (1st Cir. 2002); *Traylor v. Brown*, 295 F.3d 783, 790 (7th Cir. 2002); *Shannon v. BellSouth Telecommunications, Inc.*, 292 F.3d 712, 716 (11th Cir. 2002); *Dorsey v. Pinnacle Automation Co.*, 278 F.3d 830, 837 (8th Cir. 2002); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 813-14 (10th Cir. 2000); *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-08 (5th Cir. 1988). "Merely disagreeing with an employer's negative performance assessment is insufficient to show pretext." *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 325 (5th Cir. 2002), *citing Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 408 (5th Cir. 1999).

Several circuits have applied the reasoning of the *Reeves* opinion, and found that summary judgments in employment cases may be appropriate where, as here, a plaintiff attempts to meet his burden of proof by merely quibbling over the wisdom of the adverse employment action at issue. *See e.g.*, *Rosado v. Radio Shack*, 312 F.3d 532, 535 (1st Cir. 2002) (discounting plaintiff's "step-by-step refutation" of defendant's actions and observing that anti-discrimination laws do "not ensure against inaccuracy by an employer, only against . . . discrimination"); *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002) (holding

plaintiff had not provided sufficient proof of age discrimination such that a reasonable juror could make that inference); *Traylor v. Brown*, 295 F.3d 783, 791 (7th Cir. 2002) (refusing to automatically discredit company witnesses to the benefit of the plaintiff in order to reverse summary judgment, since "to so hold would essentially prevent any employer from prevailing at the summary judgment stage"); *Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 1279 (11th Cir. 2002) (observing that a mere "shred of evidence, without more, is insufficient to establish" pretext); *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 471-74 (6th Cir. 2002) (holding that affidavits presented by coworkers in support of the plaintiff's management style did not refute the articulated legitimate business reason for the employer's actions); *Price v. Federal Express Corp.*, 283 F.3d 715, 724-25 (5th Cir. 2002) (finding that the plaintiff failed to make a sufficient showing which would provide for a reasonable inference of discrimination); *Mathes v. Furniture Brands International, Inc.*, 266 F.3d 884, 888-89 (8th Cir. 2001) (holding that the plaintiff failed to provide sufficient, probative evidence which would allow a fact finder to rule in her favor, and instead set forth only "mere speculation"); *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1262 (11th Cir. 2001) (holding that "discrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent").

The cases cited above represent the widespread application of this Court's holding in *Reeves*, and well illustrate the situations in which a plaintiff cannot meet his burden by simply disagreeing with the company's decisions and subjectively opining that he is a better employee than is reflected by his employer's assessment.

### 2. Rang's Evidence Did Not Establish Pretext

#### (a) The Basis For Schlumberger's Motion For Summary Judgment

As stated above, Peters evaluated Rang's performance as needing development and was the decisionmaker with regard to Rang's layoff. Peters was deposed and questioned at length regarding his basis for giving Rang a "D" rating. During the approximately 80 pages of testimony on this point, Peters identified several reasons why he felt Rang's performance was in need of development. Peters testified that Rang had missed several sales and marketing figures from the objectives issued to him. Peters also indicated that he felt, based on his meetings with Rang, that Rang was not visiting all of his clients often enough to do his marketing. Moreover, Peters felt that Rang was not taking an active enough role in publishing and presenting papers to customers. All of these failings were generally categorized by Peters as a lack of initiative. Essentially, Peters felt that, during a time of shrinking revenues, he expected Rang to go above and beyond the effort he had previously devoted to his job to maintain or increase revenues.

The steps Peters followed to evaluate Rang, and ultimately make his selection for layoff, were provided to the District Court by Schlumberger in support of its motion for summary judgment. Rang responded to Schlumberger's motion with an avalanche of paperwork, over one thousand pages in fact, which nevertheless largely missed the point. While a detailed discussion of Rang's pretext "evidence" would surely surpass the page limits of this brief, the main categories presented by Rang are discussed below.

### (b) Rang's Performance in Prior Years

Rang argued that he was rated a "satisfactory or better" employee during the years 1991 to 1998. This is irrelevant, however, because Peters testified that he only considered the 1999 performance evaluation in conducting his forced ranking. Rang presented no evidence that this was false. He simply argued that the prior performance *should have* been considered.

### (c) Rang's 1999 Performance Evaluation

Rang's next argument was that Peters simply got it wrong when he gave Rang a "D" rating for his performance in 1998.[6] Here, Rang offered a ridiculous amount of "evidence," most of which was either irrelevant or simply conclusory, to advance the argument that Peters poor assessment of his work was unfounded.

To advance a pretext argument, Rang attempted to distill Peters' assessment of his performance, and hence his poor evaluation, as resting upon one statement by Peters regarding Rang's "total lack of initiative to do anything about it or get out and seek customers."

Rang devotes substantial discussion to his attempt to rebut Peters' assertion that he was not "getting out and seeing clients." This is not, in fact, what Peters asserted during his deposition. Peters testified that based on some of his meetings with customers that he attended with Rang, along with Rang's poor sales figures, Peters concluded that Rang was not getting

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6. The "1999 Performance Evaluation" addressed Rang's work performance for the year 1998.

out and seeing all of the customers often enough. Peters testified that some of the customers made statements during his visits with Rang indicating that they had not seen Rang in some time. In response, Rang argued that he actually drove more miles in 1999 than he did in previous years. He also provided affidavits from ten customers who stated that Rang did see them regularly. Nevertheless, this "evidence" is not persuasive. Rang had more than ten customers, and he certainly could drive a great number of miles and still choose to see some customers but not others. The fact that Peters believed, whether subjectively or not, that Rang was not seeing customers often enough and was not doing enough to sell services was not established as a pretext by Rang. Finally, Rang argued that: "Peters' statement is simply not credible. Such a serious offense by Rang whose sole responsibility was to call on clients and sell Schlumberger services would not have been permitted to continue for a full year . . ." This assertion is nothing more than Rang's conclusory argument that Schlumberger "should have known better." Such an assertion assumes that prior to Peters' joint sales meetings with Rang, Peters somehow would have known that Rang was not meeting with clients often enough. Again, it is simply an argumentative statement that does not establish pretext.

Peters also testified that he felt Rang lacked creativity and initiative in his sales efforts. Peters based this belief upon the fact that Rang had failed to maintain or increase all of his sales numbers objectives during a year of declining business. To "rebut" this assertion, Rang advanced several arguments. First, he repeatedly and tiresomely referenced a "Wildcatter Award" he received prior to his layoff.[7]

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7. A Wildcatter Award is given to an employee who finds new ways to help a client using Schlumberger technology.

This award reflected performance two years prior to the assessment period at issue, and thus, was simply not relevant. Second, Rang offered statements by ten customers who saw Rang regularly and thought he did show initiative. If Rang had only ten customers, this might have been useful. However, since Rang had up to forty customers he could call on in the Williston Basin area, ten affidavits is simply not substantial.

**(d) Rang's Objectives**

Rang asserts that he did not receive his performance objectives until late in the year, whereas other younger employees received them earlier. (Pet'r. Br., pp. 6, 8). This is a misrepresentation of the record evidence. Peters testified that he verbally provided all of the Sales Engineers with their objectives at a sales meeting earlier in the year. The objectives were e-mailed to all employees, including Rang, later in the year by Peters. No younger employees were given the objectives any earlier than they were received by Rang. Kirk Schmidt, who was under age forty, also complained about receiving his written objectives late in the year.

**(e) Rang's "Objective Evidence" of His Superior Qualifications**

Rang attempted to establish his superior qualifications with the affidavit of Gary Riley, a former Schlumberger supervisor who retired in 1998. Riley had not evaluated Rang's performance since 1991. While Riley went to great lengths to establish his knowledge of the "inner workings of Schlumberger," the fact remained that he had no personal knowledge of Rang's performance in 1998. Hence, Riley's

affidavit consisted of nothing more than conclusory statements such as "[T]here is a culture of age discrimination within Schlumberger . . ." and opinions that he would have rated Rang differently given the oil economy at that time. The truth remains, however, that Riley did not know how Rang performed in 1998 any more than he knew how the other employees under Peters' supervision performed. Riley's only basis for his opinion was listening to Rang and reading Peters' deposition. Riley's conclusory and hollow affidavit was nothing more than "arm chair quarterbacking" and was thus properly disregarded by the District Court.

In summary, Rang's evidence of pretext essentially consisted of his subjective belief that Peters had inaccurately assessed his performance and that he was better qualified than the employees retained by Schlumberger. In addition to this "pretext" evidence, Rang offered no other evidence that his age was a factor in any type of decision affecting him at Schlumberger. While it may be argued that Peters' assessment may be unfair, in light of a slow oil drilling economy, or whether it was conclusory because Peters did not consider prior years performance, or whether Peters' assessment was simply "misguided," Rang offered no probative evidence establishing that it was a "false reason" in the mind of Peters. Simply put, Rang disagrees with Peters' assessment of his work and wishes to have the Court second guess it. As set forth above, the court system is not designed to act as a super personnel department and second guess employment decisions, however erroneous they may appear to be. Since there was a complete absence of any meaningful evidence of age discrimination, the District Court properly dismissed Rang's age discrimination claim.

### 3. Schlumberger Presented Abundant Evidence That No Discrimination Occurred

Not only did Rang wholly fail to establish pretext, the evidence in the record makes clear that age was *not* a factor in Schlumberger's decision. In *Reeves*, this Court noted that abundant and uncontroverted independent evidence that no discrimination occurred would support a district court's dismissal. *Reeves*, 120 S. Ct. at 2109. The record before the District Court in the present case contains an abundance of such evidence.

As set forth above, two of the three employees selected by Peters for layoff were under forty. In addition, two of the employees retained by Peters were over forty. The Schlumberger employee who took over Rang's duties was over forty. Furthermore, Rang cannot connect any of the performance criticisms discussed above and cited by Peters to his age, nor does he present any evidence of age-related animus or age-biased comments by a decisionmaker. Most importantly, Rang himself admitted in his deposition that he did not sell the "key services" set forth in his objectives for 1998, nor did he increase total revenue as expected in his objectives. He further admitted he did not present a technology related paper or symposium to prospective customers as requested by Peters during 1998. While he offers several excuses for why these were not accomplished, he freely admits he did, in fact, fail to meet these objectives. Finally, Peters himself was over forty at the time of Rang's layoff, as were Peters' two superiors who approved the decision to lay off Rang. Accordingly, there is considerable evidence counter to Rang's claim demonstrating that age was in no way a factor in Schlumberger's actions taken toward Rang. This is exactly the type of "abundant and uncontroverted independent evidence that no discrimination occurred" referenced by this Court in *Reeves*. *Id.*

## CONCLUSION

In an attempt to have this Court second guess Schlumberger's decision that he was a suitable candidate for layoff, Rang has misrepresented this Court's ruling in *Reeves* as well as the Fifth Circuit's opinion in *Vadie*. Moreover, he misrepresented the record evidence in an attempt to create the appearance of objective factual disputes. When reduced to its essence, Rang's argument is not one criticizing age discrimination by Schlumberger. Rather, it criticizes Schlumberger's refusal to provide preferential treatment to him because of his years of service.[8]

The District Court, and the Fifth Circuit, did not employ a "pretext plus" standard in reviewing Rang's claims. Rang's ADEA claim was properly dismissed by the district court because he failed to offer any meaningful evidence that the true reason for his discharge was age discrimination. Rang's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PAUL E. HASH
*Counsel of Record*
CHRISTINA A. JUMP
DAVID A. SCOTT
JACKSON LEWIS LLP
3811 Turtle Creek Boulevard
Suite 500
Dallas, Texas 75219
(214) 520-2400

*Counsel for Respondent*

8. This Court specifically declined to equate years of service with age, and impliedly declined to give preferential treatment for older workers in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).

(3)

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In The

# Supreme Court of the United States

CRAIG LYNN RANG,

*Petitioner,*

v.

SCHLUMBERGER TECHNOLOGY CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## REPLY TO BRIEF IN OPPOSITION

ROGER D. PHIPPS
*Counsel of Record*
EVANTHEA P. PHIPPS
PHIPPS & PHIPPS
210 Baronne Street,
Suite 1410
New Orleans, Louisiana 70112
(504) 899-0763

*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTION PRESENTED

Whether the United States Fifth Circuit Court Of Appeals will be permitted to continue using a pretext-plus analysis in employment discrimination cases despite this Court's having expressly overruled and repudiated such an analysis in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

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## THE FIFTH CIRCUIT CONTINUES TO USE A PRETEXT-PLUS ANALYSIS

Citing *Vadie v. Mississippi State University*, 218 F.3d 365 (5th Cir. 2002), the Fifth Circuit stated in *Rang v. Schlumberger*:

> that a plaintiff can avoid summary judgment in an age discrimination case only if the evidence: (1) creates a factual issue as to whether each of the employer's stated reasons was what actually motivated the employer; *and* (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complaints[sic]). (Emphasis added).

(See Pet'r. App. at A2).

The use of the conjunction **"and"** in the quotation above shows the Fifth Circuit employing its *Vadie* analysis continues to require an employment discrimination plaintiff, such as Rang, to do something more than show that each of the employer's reasons is false to establish pretext.

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2108, 147 L.Ed.2d 105 (2000) states, "that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Disregarding *Reeves*, the Fifth Circuit continues to use the pretext-plus analysis. *Vadie*, at 373 states:

> Viewing the evidence as a whole, as we must, there is nothing probative anywhere in the record of the ultimate question of national origin discrimination. Dr. Vadie argued that Dr. Zappi, who had no teaching experience, was not qualified for the 1995 position and was certainly no match for Dr. Vadie's own record of success in researching and teaching. He further asserted that when MSU advertised for the 1993 positions, a Ph.D. in chemical engineering was not required and that the addition of such a requirement for the 1995 position was pretextual.

> **We will assume, of course, that this was believed by the jury. All that it proves, however, is that [defendant's] decision-makers had some unidentifiable reason for not wanting to hire Dr. Vadie. The evidence has no probative value with respect to the ultimate question before the jury of whether there was discrimination based on national origin and an essential element for Dr. Vadie to prove. There is simply not a scintilla of evidence that Dr. Vadie's national origin played any role in any decision that the defendant made with respect to him during his tenure.** (Emphasis added).

This analysis which the Fifth Circuit uses as its measure for whether a jury question is presented in an employment discrimination case is a direct contradiction of *Reeves*.

Under the *Vadie* analysis the Fifth Circuit will not permit an employment discrimination plaintiff, such as Rang, to establish the ultimate fact of intentional discrimination by simply establishing a prima facie case and disproving each of the employer's asserted reasons for its adverse employment decision. Under *Vadie*, the plaintiff is required to offer some additional evidence "to create a reasonable inference that age was a determinative factor in the actions of which plaintiff complains." (See Pet'r. App. at A2).

## RANG DISPROVED EACH REASON ASSERTED FOR HIS TERMINATION

Peters (Rang's manager) testified:

MR. HASH: He's asking you for any and all possible things. I want you to take your time and think about it.

MR. PHIPPS: Off the record.

(Off-the-record discussion).
MR. HASH: I want you to take your time. He's asking for every possible reason, so you need to take your time and think about your answer.
Let's go off the record for a minute while you review that.
(Recess from 5:37 to 5:45).
Q (By Mr. Phipps) We were asking a question about what factors did you use in – no?
MR. PHIPPS: Could you go back and read back the question.
(The requested testimony was read back as follows:
"QUESTION: What do you attribute to the reason why these objectives were not met for the year 1998?")
MR. PHIPPS: And then he said . . .
(The requested testimony was read back as follows:
"ANSWER: Several factors. One, a drop in oil price caused drilling activity to back off, which certainly hurts your ability to keep the same amount of work.
"Secondly is total lack of initiative to do anything about it or to get out and see customers.
"QUESTION: Anything else?"
A **No.** I mean, the only thing I could do is expound on those a little more. But just basic lack of activity, to just blame others for his problems and not actively pursue trying to do something about it. It made his results that much worse. (Emphasis added). . . .
Q Because I look at total lack of initiative

8 and/or seeing customers as really two factors and not
9 one. Can we do that?
10 A Sure.

(R.1868-1867 [Peters Dep., pp.251-254]).

Peters identified two reasons. Despite caution from his counsel, when asked if there were any more reasons, he stated, "No". Peters testified that the way he reflected Rang's "total lack of initiative to do anything about it or to get out and see customers" on Rang's evaluation was by noting that Rang needed development in "creativity" and "initiative" as well as "short term planning". (R.1865, p.261 Ll.9-25).

Rang fully addressed: 1) "total lack of initiative to do anything about it ["the drop in oil price which caused drilling activity to back off, which certainly hurts your ability to keep the same amount of work", i.e., maintain the market share]"; 2) "to get out and see customers"; reflected in a) "creativity"; b) "initiative"; c) "short term planning"; and d) "blamed others for his problems" in his Petition for Certiorari. (See Pet'r. Bf. pages 18-24). Each and every reason offered by Peters for rating Rang's job performance a "D" and selecting his employment to be terminated is unworthy of credence.

Now, for the first time, Schlumberger offers additional reasons for Peters' decision to select Rang's employment to be terminated in the 1999 RIF. Schlumberger now asserts Peters rated Rang's performance a "D" because Rang missed his sales and marketing objectives. However, by Peters' own calculation, as written on Rang's performance appraisal, Rang's overall marketshare increased by 11%. Schlumberger had never had a marketshare this large in the Williston Basin before. In the two previous years, for a lesser increase in his marketshare, ELA, Schlumberger awarded Rang merit raises based on his competitive performance. (R.938-39).

Additionally, the entire Rocky Mountain Division missed its sales and marketing objectives.[1] While Rang increased his market share by 11%, his revenue was off due to a decline in drilling activity and the corresponding price cutting that ensued. Like the other members of the sales team, Rang had no control over the decline in drilling activity and Schlumberger's corresponding price cutting. (R.1141).

Additionally, Gary Riley who retired in July, 1998, former West Coast Division Sales Manager, testified that giving Rang objectives on September 21, 1998 calling for an increase in each of his objectives in the face of rapidly deteriorating oil field activity was unreasonable. He added that under Schlumberger's procedures Peters was required to sit down with Rang and consult about the objectives before they were set which Peters failed to do. (R.1144, 1141).

Unlike Rang, *Scott* Riley received his performance objectives at the beginning of the year.[2] In contrast, Rang received his objectives in late September 1998 and had little chance of meeting all of them.[3]

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[1]

| "Team Objectives" for 1998 | Results |
|---|---|
| 1. Rockies OFS Revenue > $135,057K | $119,800K |
| 2. NWA W&T Revenue > $120,600K | $101,000K |
| 3. Rockies W&T Revenue > $36,500K | $31,814K |

[2] Schlumberger's Appellee Brief, page 5, states:

> . . . Peters determined that **three** individuals would need to be laid off from **his group** in order for him to meet the numbers required for the reduction in force. Therefore the **three individuals chosen by Peters** for layoff were *Scott* Riley, age 36, Kirk Schmidt, age 30, and Craig Rang.

Schlumberger placed its termination of *Scott* Riley's employment, and its subsequent **rehire offer to him (R.1134, 1133)**, at issue in this litigation by admitting to the District Court in its memorandum supporting its motion for summary judgment that *Scott* Riley, "a Wireline Sales Engineer in California" was Rang's "most direct comparator" (R.919).

[3] Peters **denied** at his deposition that he had input into the management, job performance appraisal, forced ranking, or employment

(Continued on following page)

Among Schlumberger's new assertions is that Rang's performance was poor, because he did not present papers as per his 1998 objectives.[4] Rang's objectives did not include presenting papers; however, on his own initiative Rang conducted nine formal seminars for his clients where papers were discussed. (R.1423-22).

Peters directed Rang to write and publish a technical paper in late September 1998.[5] Rang could not possibly have written and secured review and approval of a technical paper in so short a time. Gary Riley, a former Division Sales Manager testified about the unreasonableness of such an objective with most of the year having already elapsed.

Schlumberger also asserts here that Rang admitted he failed to sell "key services". Schlumberger makes a bald assertion that Rang has admitted to something but fails to provide citation to the alleged admission. Rang's deposition, page 162 (R.1267, 981-980, par.38-39) reveals:

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termination decision affecting *Scott* Riley. "No, I never supervised him". "Since I never supervised him, the answer would be no [I never evaluated him]." (R.1918, 1838 [Peters Dep., pp.52, 365]).

The District Court ordered Schlumberger to produce *Scott* Riley's personnel file, including his 1999 "Performance Appraisal and Development Plan". Schlumberger would not produce *Scott* Riley's 1999 "Performance Appraisal and Development Plan". However, *Scott* Riley provided his appraisal and disclosed that he had received his objectives **at the beginning of 1998** for his 1999 "Performance Appraisal and Development Plan". *Scott* Riley had the entire year within which to attempt to meet his objectives. (R.1134, par.2, 1133, 1131) (Record Excerpt #11).

[4] The Society of Petroleum Engineers' Distinguished Lecturer Committee invited Rang to serve as a "Distinguished Lecturer" for 1998-99. Because of Rang's recognized expertise the SPE suggested he lecture on the topic, "Integration of Dynamic Data." The lectures were scheduled between September of 1998 and May 1999. The SPE had in place an expense reimbursement policy. Peters denied Rang's request for permission to accept the invitation. (R.996, 966, par.83).

[5] Peters evaluated Rang in January, 1999.

> Q: Mr. Hash: "Okay. So basically, you don't believe you could sell any of the key services during this time of dropping oil prices?"
>
> A: Mr. Rang: "Oh, we [I] sold a lot of key services, but a lot of the services weren't put on here. We were [I was] selling FMI, FMSs, formation microscanners, formation microimagers. We were doing a lot of high tech work." . . . "they didn't put those high tech services on here [referring to the 1999 SLP-3e]."

Schlumberger's Opposition Brief also states that "Key Services" are "new technology"; however, these terms are not synonymous. Gary Riley, retired former West Coast Division Sales Manager, testified:

> "8. . . . I should note here that 'New Technology' and 'Key Services' are not necessarily synonymous. Some of the 'Key Services' have been around for 15-20 years." (R.1140, par.8, Rang Record Excerpt #10).

Even Peters testified that the term "Key Services" includes old technology. (R.1880-79, Dep. pp.204-05). Moreover, Peters testified that "a key way of making money in open hole [ES] is to run 'Key Services' up." (R.1850 [Peters Dep. p.317 Ll.24-25]). Yet Peters admitted in Rang's 1999 "Performance Appraisal and Development Plan" that Rang had "sew[n] up the ES Market". (R.1557, 980 par.39). The record shows Rang sold lots of "Key Services".

Peters testified he traveled (4 or 5 times) to Montana for joint sales calls with Rang during which certain statements were made indicating Rang was not calling on his clients. Rang provided affidavits from the clients Peters visited stating that the statements Peters claimed they made were never made. (See Peters' testimony, Pet'r. Bf. at p.19). Now Schlumberger, without any citation or quotation, argues that Peters' quoted testimony is not what he said. For the first time, Schlumberger now argues Peters stated Rang was not calling on all 40 of his clients. In fact, Peters did not know how many clients were in the

Williston Basin, the area Schlumberger assigned to Rang. Peters testified:

> Q: How many rigs drill up there in the Williston basin, back in January 1999 and December of 1998?
>
> A: I have no clue.
>
> . . .
>
> A: If you had 40 [rigs], it would be anywhere between 1 and 40 [clients].

(R.1868-69, Dep. pp.287-88). From Peters' hypothesis, Schlumberger now states Rang's performance was poor because he was not calling on all 40 hypothetical clients. However, the record shows Peters had no idea how many clients were available for Rang to call on, nor did Peters travel beyond the immediate Billings, Montana area to see them. The significance of the clients' affidavits is not their numbers but that they show Peters' mendacity.

## RANG DID NOT BASE HIS AGE CLAIM ON LONGEVITY OF SERVICE NOR BASE HIS PRETEXT EVIDENCE ON MERE SUBJECTIVE BELIEF

Schlumberger has a competitive job performance-based system with highly developed job grade/classifications. Based on written job descriptions, Schlumberger's sales engineers have three grades: 12 (Sales Engineer), 13 (Senior Sales Engineer), and 14 (Sales Development Engineer). These grades are based on performance factors, not longevity of service. The job grade/classification criteria are objective, not subjective.

Rang has never claimed that he was better qualified than certain younger employees who were retained at the time of the RIF decision based on longevity of service. Rang has asserted, based on Schlumberger's own objective job grade/classifications, that as a Grade 14, Sales Development Engineer (the highest grade of sales engineer at Schlumberger) he was objectively more qualified than

certain younger sales engineers who held a lower job grade/classification and were retained.

Gary Riley, Schlumberger's retired West Coast Sales Manager, examined the job grade/classification information, performance appraisals used in the forced-ranking by Peters, and Peters' deposition among other materials (R.1141). Gary Riley testified Schlumberger policies and procedures were not followed in providing Rang with his performance objectives, or in conducting the forced-ranking, and that Peters included four noncomparable employees in the forced-ranked group (R.1139-38). Based on Gary Riley's review of objective criteria – the job grade/classifications and comparative written work performance appraisals of employees against whom Peters ranked Rang – Gary Riley testified, Rang was "much better qualified" than certain younger employees who were retained. (R.1138). Schlumberger did not refute Gary Riley's testimony, and admitted that Gary Riley is a "trustworthy fellow". (R.1387).

Peters testified Rang was qualified for the position he held at Schlumberger, Sales Development Engineer, **Grade 14**, when Schlumberger terminated his employment. Thus, by Schlumberger's own objective criteria, Rang was objectively "clearly better qualified" than: Corbett (age 38, Grade 13, Sr. Sales Eng.), Gunter (age 28, Grade 12, Sales Eng.), Miller (age 42, Grade 12, Sales Eng.), and Sieben (age 36, Grade 12, Sales Eng.) and qualified for, field, sales, and district positions, Grade 14 or below (R.1138).[6]

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[6] In *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 995 (5th Cir. 1993) and *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38 (5th Cir. 1996), the plaintiffs provided subjective opinions about their relative qualifications. In contrast, Rang offered specific and objective evidence showing that he was "clearly better qualified" than certain younger employees Schlumberger retained.

While Schlumberger's Brief disparages "Wildcatter Awards", they are highly coveted at Schlumberger and not easily obtained. In 1997, Schlumberger recognized Rang's job performance with two "Wildcatter Awards" and noted that receipt of these awards was excellent (R.2134, 1498). Rang testified he was selected to receive another "Wildcatter Award" for his work in 1998 and was told he would receive the award at a ceremony in 1999; instead, his employment was terminated.

Peters was 39 when he selected Rang to be RIFed. (R.1928, 1926, 1916). Emich who took over Rang's duties was 41. (R.1760-59).

Schlumberger maintained in the Fifth Circuit that Rang sought "to establish pretext by relying upon the post-reduction in force treatment of Scott Riley and Kirk Schmidt." (Appellee Brief, p. 15). Now, before this Court, Schlumberger says Rang is complaining that he was entitled to a preference because of years of service. Rang makes no such claim.

## CONCLUSION

Rang seeks a correct application of *Reeves* in this matter and proper consideration of the pretext evidence he presents which rests on specific objective criteria. Schlumberger has neither abundant nor independent evidence of the type which would allow this case to fall within the *Reeves* exception. This Honorable Court should grant Certiorari. Discrimination plaintiffs within the Fifth Circuit must be governed by *Reeves*, rather than *Vadie*.

Respectfully submitted,

ROGER D. PHIPPS
*Counsel of Record*
EVANTHEA P. PHIPPS
PHIPPS & PHIPPS
210 Baronne Street, Suite 1410
New Orleans, Louisiana 70112
(504) 899-0763

*Counsel for Petitioner*